DISABILITY DISCRIMINATION LAW APPLICABLE TO FEDERAL EMPLOYMENT

A. Statutes and Regulations

1. The Rehabilitation Act of 1973

Section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791, was passed with the intention of protecting people with disabilities against discrimination stemming not only from overt prejudice, but also from the archaic attitudes many in the work force have about disabled persons. *School Board of Nassau County* v. *Arline*, 480 U.S. 273, 279 (1987). See also *Bragdon v. Abbott* 118 S.Ct. 2196 (1998). Congress recognized that society's accumulated myths and fears about disability and disease are as handicapping as are the physical or mental limitations that flow from an actual impairment. *Arline, supra*, at 284. Accordingly, the Act was carefully structured to replace "reflexive reaction" to actual or perceived impairments with actions based on "reasoned and medically sound judgements." *Arline, supra*, at 285.

2. The Americans with Disabilities Act

In 1990 Congress passed the Americans with Disabilities Act (ADA), Pub. L. 101-336, 104 Stat. 330, 42 U.S.C. § 12101 *et seq*., July 26, 1990. Section 512 of Title V of the ADA amends the Rehabilitation Act to exclude from its coverage "an individual who is currently engaging in the illegal use of drugs." 42 U.S.C. § 12211. The ADA is otherwise not applicable to federal employees.

3. The Civil Rights Act of 1991

The Civil Rights Act of 1991, Pub. L. 102-166, 105 Stat 1071, *et seq*., which amended the Civil Rights Act of 1964, allows for jury trials, the payment of expert witness fees and the payment of compensatory damages for past pecuniary loss (actual out-of pocket expenses) proximately caused by the discrimination, with a cap of up to $300,000.00 for future pecuniary loss and nonpecuniary harm (emotional harm) (the federal government is exempt from the Act's provision permitting punitive damages), except that in a disability discrimination case no compensatory damages will be awarded if the agency has engaged in "good faith efforts" to reasonably accommodate the employee.

4. EEOC Regulations

On October 1, 1992 new EEOC regulations, 29 C.F.R. § 1614 *et seq*., were implemented replacing § 1613 *et seq*. The new regulations codify *Ignacio* v. *United States Postal Service*, 84 FEOR 3159 (1984), *aff'd* 86 FEOR 5055, 86 FMSR 7026 (Special Panel 1986) and require that the agency offer reassignment as a reasonable accommodation. Section 1614.203(g). The regulations also provide that "an individual currently engaged in the illegal use of drugs" is no longer considered a disabled employee. Section 1614.203(h).

5. Americans with Disabilities Act regulations

Effective July 26, 1992, the EEOC enacted the regulations implementing Title I (Employment) of the ADA. 29 C.F.R. § 1630 *et seq*. Although Title I of the ADA is inapplicable to the Federal government, it is apparent that it was modeled after the Rehabilitation Act. In fact, the ADA provides that administrative complaints under both the ADA and the Rehabilitation Act must be dealt with in a manner that "prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973." The new regulations have an appendix that provides in depth advice, guidance and examples that may help clarify the obligations of the agency. A word of caution: while § 1630 might provide some insight for agencies, § 1614 not § 1630 is applicable to Federal employees.

6. Rehabilitation Act Amendments of 1992, H.R. 5482

On October 29, 1992, the President signed the Rehabilitation Act Amendments of 1992. The amendments substituted the word "disability" for "handicap" throughout the Rehabilitation Act. Moreover, the 1992 amendments provide in pertinent part that the ADA standards will be applicable to the Rehabilitation Act. Specifically, 29 U.S.C. 791(g) provides:

> The standards used to determine whether this section has been violated in a complaint alleging non-affirmative action employment discrimination under this section shall be the standards applied under title I of the [ADA](42 U.S.C.12111 et seq.) and the provisions of sections 501 through 504, and 510, of the [ADA](42 U.S.C. 12201-12204 and 12210) as such sections relate to employment.

Thus the ADA regulations and case law applicable provide useful guidance in evaluating a disability discrimination complaint under the Rehabilitation Act.

H.R. 5482 also excludes from consideration as disabilities certain conditions that previously had been excluded under the ADA. These conditions include homosexuality, bisexuality, transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, other sexual behavior disorders, compulsive gambling, kleptomania, pyromania, and psychoactive substance abuse disorders resulting from current illegal drug use.

B. Identifying the Theory of the Disability Discrimination Case: The Difference Between Disparate Treatment and Surmountable Barrier Disability Discrimination

There are generally two theories of disability discrimination cases covered by the Rehabilitation Act of 1973, 29 U.S.C. § 701 *et seq*. (the Act): (1) disparate treatment and (2) surmountable barrier disability discrimination.[1] The first step, upon receipt of a disability discrimination case, is

---

[1] Disparate impact handicap discrimination is a third theory of handicap discrimination that is rarely raised and is not discussed in this memorandum.

to determine which theory of discrimination is alleged, *Clark v. U.S. Postal Service*, 74 MSPR (1997).

The focus of disparate treatment cases is on whether the complainant alleges he or she was treated less favorably than similarly situated non-disabled employees or was subjected to some unfavorable personnel action under circumstances in which it could be inferred that the motivation for the action was the employee's disabled status. In such cases the issue is not whether the employee requests or requires an accommodation. *Dillon* v. *Garrett, Secretary, Department of the Navy*, 91 FEOR 3187 (1990) (allegation of failure to receive an annual performance appraisal was subjected to disparate treatment analysis, whereas allegation that agency refused to grant the employee his requested accommodation that he receive a parking spot close to his work area was appropriate for surmountable barrier analysis.)

The focus of surmountable barrier discrimination cases is usually on whether the employee can perform the essential functions of the position in question with a reasonable accommodation. *Clark, supra.* Surmountable barrier discrimination cases usually involve allegations that the agency failed to grant the complainant a requested accommodation or to fulfill its obligations to consider reasonable accommodation alternatives. *Crumb* v. *Frank, Postmaster General, U.S. Postal Service*, 91 FEOR 3211 (1990) (agency discriminated against the complainant, an asthmatic, when it failed to consider reassigning the complainant to another position off the workroom floor as an accommodation).

C. The *Prima Facie* Case, Burden, and Order of Proof Recognized by the EEOC in a Disparate Treatment Disability Discrimination Case

The burden of proof in disparate treatment cases is generally allocated according to the standard established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). This case set forth a three-tier test for determining whether there has been discrimination in violation of Title VII of the Civil Rights Act. The *McDonnell Douglas* standards have been held to be applicable to disparate treatment cases arising under the Rehabilitation Act. *Prewitt v. United States Postal Service*, 662 F.2d 292 (5th Cir. 1981).

In order to establish a *prima facie* case of disparate treatment handicap discrimination, the complainant must show: (1) that he or she is a disabled person; (2) that he or she is a qualified disabled person; and (3) that he or she was treated less favorably than similarly situated non-disabled persons.[2] *Schneider* v. *Brady, Secretary, Department of the Treasury*, 91 FEOR 3290 (1991). Once a *prima facie* case has been established, the burden of going forward shifts to the

---

[2] The definitions of disabled person and qualified disabled person will be discussed *infra* as part of the analysis of surmountable barrier handicap discrimination.

employer to articulate a legitimate, nondiscriminatory reason for its challenged action. If the employer articulates a legitimate reason, the burden then shifts back to the complainant to prove by a preponderance of the evidence that the articulated reason is mere pretext for discrimination. *Schneider, supra,* (complainant failed to show that he received a lower performance appraisal than he had received in years because he was a disabled person); *Gant* v. *Frank, Postmaster General, U.S. Postal Service*, 91 FEOR 3495 (1991) (complainant demonstrated that he was discriminated against on the basis of his disability when he was not selected for the position of mail handler where the parties stipulated that he was capable of performing the essential elements of the job and that he did not request nor did he require any accommodation in order to perform the job); *Derwinski, Secretary, Department of Veterans Affairs*, 91 FEOR 3217 (1990) (complainant did not show that her non-promotion was due to her alleged disability).

D. The *Prima Facie* Case, Burden and Order of Proof Recognized by the EEOC in Surmountable Barrier Disability Discrimination Complaints

1. The *prima facie* case in an adverse action case

To establish a *prima facie* case of surmountable barrier disability discrimination in an adverse action case before Equal Employment Opportunity Commission (EEOC) the complainant must show that: (1) he is an "individual with a disability" as defined in 29 C.F.R. § 1614.203(a)(1); (2) he is a "qualified individual with a disability" as defined in 29 C.F.R. § 1614.203(a)(6), in that there are "plausible reasons" to believe that with or without reasonable accommodation he can perform the essential functions of the position in question; (3) the agency took an adverse action against the complainant; and (4) there is a causal relationship between the employee's disabling condition and the agency's reasons for the adverse action. *Walker v Widnall, Secretary, Department of the Air Force*, 97 FEOR 3017 (1996).

The complainant must also show that the accommodation will assist him perform the essential functions of his job. If the employee cannot perform the essential functions, even with an accommodation, than the employee is not a qualified individual with a disability and is not covered under the Rehabilitation Act. *Gilbert v. Frank*, 949 F.2d 637, 644 (2nd Cir. 1991); *Bradley v. Shalala*, EEOC Petition No. 03960081 (1996).

Another basis to challenge the existence of a *prima facie* case is if the complainant fails to demonstrate that the agency had knowledge of his disability prior to taking the adverse action, *Rodgers v. Widnall, Secretary, Department of the Air Force*, 96 FEOR 3151 (1996); *Gibson v. West,* 96 FEOR 1008 (1996)**.**

2. The *prima facie* case in non-adverse action cases where the employee has been denied an accommodation

In non-adverse action cases where the complainant was denied a requested accommodation, the complainant must establish in his prima facie case that (1) he is a disabled employee; (2) a

qualified individual with a disability; (3) the agency was aware of the disability; (4) an accommodation was needed, that is, a causal relationship existed between the disability and the requested accommodation; and (5) the agency failed to provide the necessary accommodation. *Gaines v. Marvin Runyon,* 107 F.3d 1171 (6th Cir. 1997); *see McKenzie v. Rice, Secretary, Department of the Air Force*, 91 FEOR 1108 (1991); *Mungaray v. Frank, Postmaster General, U.S. Postal Service,* 91 FEOR 3295 (1991). The employee must also establish that the accommodation is needed to perform the essential functions of the position in question. *Gaines, supra.*

3. The *prima facie* case in an applicant case

A prima facie case in a hiring case requires proof that the applicant is an individual with disabilities and a qualified individual with disabilities in that with or without a reasonable accommodation the employee can perform the essential functions of the position he applied for. *Gilbert v. Frank,* 949 F.2d 637 (2nd Cir. 1991); *see Tschida v. Ramsey* 927 F.Supp. 337 (D. Minn 1996).

4. The *prima facie* case in promotion cases

A complainant sets forth a *prima facie* case of surmountable barrier disability discrimination in a non-promotion case by establishing that he /she (1) is an individual with a disability; (2) is a qualified individual with a disability; and (3) was subjected to an adverse personnel action such as non-promotion under circumstances which gives rise to an inference of discrimination. *Visage v. Widnall, Secretary, Department of the Air Force,* 95 FEOR 3228 (1995). The complainant must make a plausible showing that there is a nexus or causal relationship between his disabling condition and the agency's decision not to promote the complainant. Id;. *See Blizzard v Dalton,* 905 F.Supp 331 (E.D. Va. 1995); *Adrain v. Alexander, Secretary, Department of Education,* 792 F.Supp. 124 (D.D.C. 1992); *Bruegging v. Burke*, 696 F. Supp. 674 (D.D.C. 1987)(The complainant must show that the reason for the non-promotion was related to his/her disability and the agency's failure to grant an accommodation request). The complainant must also show there are plausible reasons to believe that he/she could be accommodated. *Id; see Calvin v. Horner, Director, Office of Personnel Management,* 89 FEOR 1053 (1988); *Kuehl v. United States Postal Service*, 87 FEOR 3388 (1987).

5. The burden and order of proof once the complainant has established a *prima facie* case

Once the complainant establishes a *prima facie* case, the burden shifts to the agency to show that either no accommodation is possible or that such an accommodation would impose an undue hardship on agency operations. *Andolino v. Runyon, Postmaster general, U.S. Postal Service,* 96 FEOR 3162 (1996); *Prewitt v. U.S. Postal Service*, 662 F.2d 292 (5th Cir. 1981). However, if the agency comes forward with credible evidence that an accommodation was not reasonably the complainant may not remain silent and must prove otherwise. Id.

> ... the burden of proving inability to accommodate is upon the employer...The employer has greater knowledge of the essentials of the job than does the handicapped applicant. The employer can look to its own experience, or, if that is not helpful, to that of other employers who have provided jobs to individuals with handicaps similar to those of the applicant in question. Furthermore, the employer may be able to obtain advice concerning possible accommodations from private and government sources...
>
> Although the burden of persuasion in proving inability to accommodate **always remains on the employer** we must add one caveat. Once the employer presents credible evidence that indicates accommodation of the plaintiff would not reasonably be possible, the plaintiff may not remain silent. Once the employer presents such evidence, the plaintiff has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence.

Prewitt, supra, at 308; *see Borkowski v. Valley Central School District*, 63 F.3d 131 (2nd Cir 1995)(*Borkowski* provides a detailed discussion on the burden of proof in reasonable accommodation cases in a number of different federal circuits). The EEOC has adopted the *Prewitt* burden of proof analysis as described above.

E. Disability Discrimination Raised in Cases Appealed to the Merit Systems Protection Board

1. The *Prima Facie* Case

Where the appellant must rely on indirect evidence to establish his disability claim, that is, where the agency alleges that it was unaware that the appellant was disabled or that the action was taken for a reason unrelated to the alleged disability, the traditional *McDonnell Douglas Corp v. Green*, analysis will apply. *Clark v. United States Postal Service***,** 74 M.S.P.R. 552, 559 (1997).

Where the agency acknowledges, however, that the appellant was disabled and that the disability was the basis for removal, an entirely different analytical framework is required. Here there is direct evidence that the employee's disability was considered in making the employment decision. In such a case, it is necessary to distinguish between those cases in which the appellant (a) alleges that he can perform the essential functions of the position without reasonable accommodation, with those cases in which the appellant (b) concedes that he cannot perform the essential functions of the position without reasonable accommodation. *Clark supra at* 559-560.

In the first case, where the appellant alleges he does not need an accommodation, objective evidence will usually be sufficient to establish whether the appellant's disability renders him unqualified to perform the essential functions of the job, *Clark supra at* 559-560.

In the second type of case, where the appellant concedes that he/she requires an accommodation in order to perform the essential functions of the job, the appellant establishes a *prima facie* by (1) proving he/she is a person with a disability; (2) proving the appealed action is based upon his/her disability; and (3) articulating, to the extent possible, a reasonable accommodation which the appellant believes would permit him/her to perform the essential functions of appellant's current position or of a vacant position, *Clark supra at* 559-560; *Stevens v. Department of the Army*, 73 MSPR 619 (1997); *Haack v. United States Postal Service*, 68 MSPR 275 (1995); *Phillips v. Department of the Navy*, 67 MSPR 74, 76 (1995); *Sheehan v. Department of the Navy* 66 MSPR 490, 493 (1995); *Savage v. Department of the Navy*, 148, 151-152 (1988).

Appellant initially need make only a facial showing that her disability can be accommodated. *Jackson v. United States Postal Service*, 73 MSPR 512 (1997); *Savage v. Department of the Navy*, supra, at p. 152, n.2. The appellant's burden in this respect is not deemed to be a heavy one. *Robinson v. Department of the Air Force*, 77 MSPR 486 (1998); *Jackson, supra*; *Gilbert v. Frank*, 949 F.2d 637, 642 (2nd Cir. 1991). It is sufficient to present evidence as to his or her individual capabilities and suggestions for some reasonable assistance or job modification. *Id*. The Board has recognized that employers are in a better position than the employee to know about appropriate vacancies. *Jackson*, *supra*; *Gilbert v. Frank*, 949 F.2d 637, 642 (2nd Cir. 1991).

As part of the *prima facie* case, the appellant must show that the disability caused the adverse action, *McCray v.Department of Defense*, 68 MSPR 186 (1995); *Sublette v. Department of the Army*, 68 MSPR 82 (1995). The appellant must also establish a nexus between the requested accommodation and the disability, *Cason v. National Aeronautics and Space Administration*, 37 MSPR 261(1988) and that the accommodation must permit the employee to perform the essential functions of the position in question, *Malbouf v. Department of Army*, 43 MSPR 588 (1990).

The appellant must also show that the agency had knowledge of the appellant's disability prior to taking the adverse action. *McCray, supra; Sublette, supra*. An agency has knowledge if the disability is raised during the reply period in response to a proposed adverse action. *Sublette, supra; Adams v. Department of the Navy*, 51 MSPR 276 (1991).

2. The burden and order of proof

If the appellant establishes a *prima facie* case, the agency must produce evidence to rebut the appellant's claim. If the agency claims that the disabled individual is unqualified to perform the job, even with a reasonable accommodation, the appellant must prove that he would, in fact, be qualified to perform the essential elements of the job if the agency were to adopt the proposed accommodation, and that the proposed accommodation is objectively reasonable. The burden of proof remains with the appellant in such a case. *Robinson v. Department of the Air Force*, 77 MSPR 486 (1998); *Clark, supra, at 560, citing Monette v. Electronic Data Systems Corp., 90 F.3d 1173, 1182-3* (6th Cir. 1996). If the appellant does prove that he can perform his/her job, however, or a position to which he could be reassigned, with reasonable accommodation, and/or the agency concedes this point, the burden of production shifts to the agency to show that the

reasonable accommodation issue would create an undue hardship. *Id.*

> Put simply, if the employer claims that a proposed accommodation will impose an undue hardship, the employer must prove that fact. If the employer claims instead that the disabled individual would be unqualified to perform the essential functions of the job even with the proposed accommodation, the disabled individual must prove that he or she would in fact be qualified for the job if the employer were to adopt the proposed accommodation.

Clark, supra, at 561, *quoting Monette, supra*, at 1184. Ultimately, the appellant must prove that he is a qualified person with disabilities, that is, an individual who can perform the essential functions of his position or to a reassigned position, with or without reasonable accommodation, without endangering the health and/or safety of himself and/or others. *Clark, supra* at 561.

F. Issues in Disability Discrimination Cases

1. Determining whether the complainant is an "individual with a disability"

The first issue in any disability discrimination case is whether the employee is an individual with a disability within the meaning of the Rehabilitation Act of 1973, 29 U.S.C. § 791. An individual with a disability is an individual who:

> (I) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment.

29 C.F.R. § 1614.203(a)(1). "Congress plainly intended the Act to cover persons with a physical or mental impairment (whether actual, past, or perceived) that substantially limited one's ability to work." *School Board of Nassau County v. Arline*, 480 U.S. 273, 285, n.10 (1987); see also *Brangdon v. Abbott* 66 USLW 4601 (June 25, 1998).

Thus, there are three categories of disabled persons under the Act: (1) those who presently have some impairment substantially limiting a major life activity; (2) those who have a record or history of a physical or mental disability that substantially affects a major life activity but are incorrectly perceived to presently have such an impairment; and (3) those who have never had a substantial impairment that affects a major life activity but are incorrectly regarded or perceived as presently having such an impairment.

a. Does the complainant have a physical or mental impairment which substantially limits a major life activity

In order to be covered under the Rehabilitation Act, the employee must first show that he or she

is an individual with a disability within the meaning of 29 C.F.R. § 1614.203(a)(1). The definition of a disabled employee should be broadly construed. *Fulgham* v. *Ball, Secretary, Department of the Navy*, 89 FEOR 1080 (1989) *citing School Board of Nassau County* v. *Arline*, 480 U.S. 273 (1987).

A disabled person is an individual who (a) has a physical or mental impairment which (b) substantially limits at least one of his or her major life activities, *Lowe v. Angelo's Italian Foods, Inc.*, 87 F.3d 1170, 1174 (1996), (lifting is a major life activity and that inability to lift more than 15 pounds creates genuine issues of material fact as to whether the impairment substantially limits the ability to lift); *Jasany* v. *United States Postal Service* 755 F.2d 1244, 1249 (6th Cir. 1985). EEOC regulation defines "physical or mental impairment" as:

> (I) any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: Neurological; musculoskeletal; special sense organs; cardiovascular; reproductive; digestive; genito-urinary; hemic and lymphatic; skin; and endocrine; or (ii) any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities.

29 C.F.R. § 1614.203(a)(2).

It is not difficult for an employee to demonstrate that he/she has an impairment. In fact "any condition which weakens, diminishes, restricts, or otherwise damages an individual's health or physical or mental activity" is an impairment under the Act. *E.E. Black, Ltd.* v. *Marshall*, 497 F.Supp.1088, 1097 (D. Hawaii, 1980); *see de la Torres* v. *Bolger*, 610 F.Supp.593, 596 (D.C. Tex. 1985), *aff'd*, 781 F.2d 1134, (5th Cir. 1986) ("impairment cannot be divorced from its dictionary and common sense connotation of a diminution in quality, value, excellence or strength").

However, characteristics that are "commonplace" are not impairments. *Daley* v. *Koch*, 892 F.2d 212, 215 (2nd Cir. 1989) (applicant for police officer is not impaired despite possessing commonplace personality traits of poor judgement, irresponsible behavior and poor impulse control); *Mauriello* v. *U.S. Postal Service*, 86 FEOR 3255 (1986) (lack of strength necessary to perform letter carrier position, unrelated to any physiological disorder, disfigurement, anatomical loss or condition affecting the employee's health, and attributable only to the quality of muscle tone, does not constitute an impairment.)

In order to prove he/she is a disabled person, the employee must also demonstrate that the impairment "substantially limits" one or more "major life activities". 29 C.F.R. § 1614.203(a)(1)(I). The term "major life activities" means "functions, such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and **working**." (Emphasis added). 29 C.F.R. § 1614.203(a)(3). See *Brangdon v. Abbott* 66 USLW 4601 (June 25, 1998)(the Supreme Court held that HIV infection is a disability under the ADA, even when

the infection has not yet progressed to the so-called symptomatic phase, as a physical impairment which substantially limits the major life activity of reproduction. The Court rejected the petitioners argument that Congress only intended the ADA to cover those aspects of a person's life which have a public, economic, or daily character. Rather, the test is whether the impairment substantially affects a "major" life activity. The Court found that reproduction could not be regarded as any less important than the major life activities of working and learning than are listed in the regulations.) Even if the individual has a condition that impairs only his/her ability to work, that individual can be a disabled person within the meaning of the Act. *Pritchard v. Southern Company Services, Inc*, 92 F.3d 1130 (11th Cir. 1996), *Harrison* v. *Marsh*, 46 FEP Cases 971, 977 (W.D. Mo. 1988). This of course is not an exhaustive list.

A mild or moderate impairment is not a substantial limitation within the meaning of the regulations, *Bailey v. Runyon*, 96 FEOR 3110 (1996); *Jenkins* v. *U.S. Postal Service*, 87 FEOR 3064 (1987) (a letter carrier suffering from hypertension which impaired his ability to carry out the particularly difficult route to which he or she had been assigned, but not other routes or other duties, had only a "mild" or "moderate" impairment that did not substantially limit any of his major life activities); *Oesterling* v. *Walters*, 760 F.2d 859 (8th Cir. 1985) (a clerk typist diagnosed as having varicose veins [an impairment] which adversely affected her ability to stand and sit [a major life activity] was not a disabled employee since her condition was described by her doctors as only "mild to moderate" and, therefore, it did not substantially interfere with a major life activity).

Similarly, an impairment that interferes with an individual's ability to perform a single unique job, but does not significantly decrease that individual's ability to perform an occupation generally, is not a substantial limitation within the meaning of the regulations, *Weiler v Household Finance Corp.*, 101 F.3d 519 (7th Cir. 1996)(plaintiff did not prove that her anxiety and depression substantially limited her in any major life activities enumerated in the regulations. Plaintiff's inability to get along with her particular supervisor is not a substantial limitation of the major life activity of working because it only precludes the plaintiff in performing in a single job and not a broad range or class of jobs); *Forrisi* v. *Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (acrophobia did not constitute a substantial limitation of a major life activity, since there was no evidence that the terminated employee, who was required to scale heights as part of his job, would have a significant barrier to employment as a result of the condition); *Wright* v. *Tisch, Postmaster General*, 88 FEOR 5O24 (E.D. Va. 1987) (employee who had respiratory ailments while working in a dusty environment was not a disabled employee since her allergy restricted her "only from the unusual, if not unique, environmental conditions" in which she worked); *Evans* v. *Frank, Postmaster General, U.S. Postal Service*, 91 FEOR 1097 (1991) (Mail Handler with service connected knee injury was not a disabled employee since there was no evidence that his impairment substantially disadvantaged or limited him in any other job position, other than the Mail Handler position).

To determine whether an employee is disabled, the courts will look at whether an impairment substantially limits an employee beyond his/her ability to perform a particular job for a particular

employer.

> [The courts will look to the number and types of jobs from which the person is disqualified, the geographical area to which the individual has reasonable access, and the individual's job expectations and training.

Ante, et. al. v. *Rice, Secretary, Department of the Air Force*, 91 FEOR 3339 (1991); *Weiler v Household Finance Corp*., 101 F.3d 519 (7th Cir. 1996), *Macaranas* v. *U.S. Postal Service*, 48 M.S.P.R. 323 (1991). Thus, given the foregoing example of the Mail Handler discharged because of his knee injury, *Evans, supra,* if the employee only had training as a Mail Handler and had no meaningful access to similar employment within the relevant geographical area, the Commission might have found he or she was a disabled employee.

An impairment does not include a temporary illness or injury, *Dunn v. Runyon, Postmaster General, U.S. Postal Service*, 94 FEOR 3178 (1993)(employee with herniated disc in his neck was not disabled when his doctor indicated that his impairment was of temporary duration, i.e. her work restrictions were only in effect for 30 days and the employee would be able to return to full duty within a few weeks to two months); *Evans* v. *Dallas*, 861 F.2d 846, 852-853 (5th Cir. 1988) (knee injury that limited employee's life activities during recuperation, but did not continue to do so, was not an impairment within the meaning of the Act); *Stevens* v. *Stubbs*, 576 F.Supp. 1409, 1414 (N.D. Ga) (employee who suffered from undisclosed "transitory" illness which had no permanent effect on the employee's health, did not suffer from an impairment within the meaning of the Act); *Stockton* v. *U.S. Postal Service*, 87 FEOR 3339 (1986) (employee suffering from "temporary disability" did not possess an impairment that substantially affected a major life activity).

This does not mean, however, that a medical condition must be completely permanent to qualify as an impairment. While the EEOC agrees that generally a temporary or transitory illness is not sufficient to qualify one as a handicapped person, it finds that this rule should be applied "primarily in cases of minor injuries or impairments of short duration." *Florence* v. *Frank, Postmaster General, U.S. Postal, Service*, 90 FEOR 3041 (1989) (employee who was severely limited in his activity for one and one half years was a handicapped person within the meaning of the Act); *Perez* v. *Housing Authority*, 677 F.Supp. 357, (E.D. Pa. 1987), *aff'd* 841 F.2d 1120 (3rd. Cir. 1988) (a back problem which lasted one year was held to be a handicap for purposes of the Act). Further, an intermittent injury, which permits an employee to function perfectly well during quiescent periods, but incapacitated the employee during acute exacerbations of the problem, is a disabling condition. *Jeffers* v. *Department of the Navy*, 86 FEOR 3046 (1986).

b. Does the complainant have a record of an impairment which substantially limits a major life activity

29 C.F.R. §1614.203(a)(3) provides:

> Has a record of such an impairment means has a history of, or has been classified (or misclassified) as having a mental or physical impairment that substantially limits one or more major life activities.

The EEOC has adopted the identical definition of "has a record of such impairment" in its regulations implementing the Americans with Disabilities Act (ADA). 29 C.F.R. § 1630.2(k). In its Appendix to Part 1630, the EEOC explains: "The intent of this provision, in part, is to ensure that people are not discriminated against because of a history of disability." [Appendix to the ADA, Fed. Reg. Vol. 56, No. 144, July 26, 1991, p. 35739, 35742]. Thus, an individual who has recovered from a disabling condition is covered by the Act if he or she is discriminated against on the basis of his or her former condition.

This provision, for example, protects former cancer patients from discrimination based upon their prior medical history. *Id*. It also ensures that people are not discriminated against because they have been misclassified as disabled. For example, individuals misclassified as learning disabled are protected from discrimination based upon the erroneous classification. *Id*.

There are many records that could contain information about a disability, such as education, employment or medical records. However, a record of being a disabled veteran, or of disability retirement, does not, *per se* guarantee coverage. To qualify as a disabled person under this category, the individual must have a record of an impairment that substantially limits a major life activity. *Id.*; *School Board of Nassau County* v. *Arline*, 480 U.S. 273, 281 (1987) (a teacher who had been hospitalized for tuberculosis, which was in remission for 20 years and relapsed in 1978 and was fired for susceptibility to a contagious disease, had a record of impairment because her medical records indicated that her disease affected her respiratory system which substantially limited one of her major life activities); *Jones* v. *U.S. Postal Service*, 88 FEOR 1048 (1987) (an employee's classification as a schizophrenic for purposes of disability retirement benefits established a record of a mental disability). A person with such a record is considered a disabled person even though he/she does not presently have an impairment that substantially limits a major life activity. *Southeastern Community College* v. *Davis*, 442 U.S. 397, 405, n.6 (1979).

c. Is the complainant regarded as having an impairment that substantially limits a major life activity

The previous two categories require that the individual either actually have an impairment that substantially limits a major life activity or have a record of such impairment. An individual in this third category is covered by the Act even if there is absolutely no evidence that the he/she has or ever had such an impairment if he or she is "regarded", that is, incorrectly perceived by the

employer, as being substantially impaired. *Curry v. West, Secretary, Department of the Army*, 96 FEOR 1100 (1995)(applicant's knee and back injuries were not sufficiently severe to be considered disabling conditions. However, the employee was protected by the Rehabilitation Act because he was *regarded* as disabled by the agency as disabled where the agency erroneously believed that because of his medical condition he could not perform the essential function of the position of GS-11 Electronics Mechanic).

The phrase 'is regarded as having such an impairment' means the employee is treated as if he or she had such an impairment. *Leckelt* v. *Board of Commissioners of Hospital District No. 1*, 909 F.2d 820, 825 (5th Cir. 1990). By including in the definition of disabled person those individuals who are regarded as being impaired:

> Congress acknowledged that society's accumulated myths and fears about disability and disease are as handicapping as are the physical limitations that flow from actual impairment . . . . The Act is carefully structured to replace such reflexive reactions to actual or perceived handicaps based on reasoned and medically sound judgements . . . .

School Board of Nassau County, Fla. v. *Arline*, 480 U.S. 273, 285 (1987). 29 C.F.R.§ 1614.203(5) provides:

> Is regarded as having such an impairment means (1) has a physical or mental impairment that does not substantially limit major life activities but is treated by an employer as constituting such a limitation; (2) has a physical or mental impairment that substantially limits major life activities as a result of the attitude of an employer toward such impairment; (3) or has none of the impairments defined in paragraph (a)(2) of this section but is treated by an employer as having such an impairment.

The first part of this definition covers an individual with a minor impairment that is unfairly treated by the employer as having an impairment that substantially limits a major life activity. For example, an employee who has controlled high blood pressure that is not substantially limiting, who is reassigned to a less strenuous job because of unsubstantiated fears that he or she could suffer a heart attack, would be considered a disabled person. [Appendix to 29 C.F.R. § 1630. 2(l)].

The second part of the "as regarded" definition applies in a situation where the impairment is only substantially limiting because of the attitudes of others. For example, an employee who has a large facial scar or disfigurement, or has a condition which causes the employee to periodically jerk his head, but does not have an impairment that substantially limits a major life activity, would be a disabled person if, as a result of negative reactions from other employees, he was fired. The employer would be regarding the employee as a disabled person, even though he or she otherwise would not be covered by the Act. [Appendix to 29 C.F.R. § 1630. 2(l)].

The third part of the "as regarded" definition applies if the employer erroneously believes that the employee has an impairment that substantially limits a major life activity which he or she does not in fact have. For example, an employee is removed based on the totally unfounded rumor that he or she has a contagious disease. Even though the employee has no impairment whatsoever, he or she was regarded by the employer as having such an impairment and is therefore considered a disabled person. [Appendix to 29 C.F.R. § 1630. 2(l)].

Some examples of cases where the individual was regarded as disabled include: *School Board of Nassau County, Fla.* v. *Arline*, 480 U.S. 273(1987)(teacher with tuberculosis was regarded as substantially impaired); *Curry v. West, Secretary, Department of the Army*, 96 FEOR 1100 (1995)*(*employee with mild knee impairment not sufficiently severe to qualify as a disability was regarded by the agency as disabled); A*ndress* v. *Frank, Postmaster General, U.S. Postal Service*, 88 FEOR 1157 (1988) (employee with knee injury who was determined by his physician to be completely healed was regarded as substantially impaired by his employer); *Jones* v. *U.S. Postal Service*, 88 FEOR 1048(1987) (employee diagnosed as a schizophrenic but determined by physician to be no longer disabled, was regarded as substantially impaired by the employer).

However, an employer does not necessarily regard an employee as disabled simply by finding the employee to be incapable of satisfying the singular demands of a particular job. Rather, the employer must regard the "employee as disabled in his or her ability to work by finding the employee's impairment to foreclose generally the type of employment involved." *Forrisi* v. *Bowen*, 794 F.2d 931, 934-935 (4th Cir. 1986) (employer who never doubted the employee's ability to work in his chosen profession, did not discriminate against an employee with acrophobia, when he or she was discharged from a particular job that required him to climb ladders and scale heights); *Tudyman* v. *United Airlines*, 608 F.Supp.739, 746 (D.C. Cal. 1984) (refusal to hire someone for a single job does not in and of itself constitute perceiving the plaintiff as a handicapped individual--applicant not selected because he was overweight).

2. Determining whether the complainant is a qualified individual with disabilities

In most reasonable accommodation disability discrimination cases it is relatively easy to determine whether the individual has a disability. However, the individual must also prove that he/she is a qualified individual with disabilities in order to be covered under the Act. If the individual is a qualified individual with disabilities (previously referred to in § 1613.702 (f) as a qualified handicapped person) the agency must afford the accommodation unless it would cause an undue hardship on agency operations. If the individual is not a qualified individual with handicaps, the agency has no obligation to accommodate.

The EEOC defines a qualified individual with disabilities as:

> . . . an individual with handicaps who, with or without reasonable accommodation, can perform the **essential functions** of the position in question without

endangering the health and safety of the individual or others and who, depending upon the type of appointing authority being used:

(I) Meets the experience and/or education requirements (which may include passing a written test) of the position in question; or

(ii) meets the criteria for appointment under one of the special appointing authorities for individuals with handicaps.

29 C.F.R. § 1614.203(a)(6)(emphasis added).

There are four types of qualified individuals with disabilities: (1) a disabled applicant who can perform the essential functions of the position he or she applied for with or without reasonable accommodation, *Gilbert* v. *Frank*, 949 F.2d 637 (2nd Cir. 1991); (2) a disabled employee who can perform the essential functions of his current position with or without reasonable accommodation, *Jewell* v. *Brady, Secretary, Department of the Treasury*, 89 FEOR 3177 (1989); (3) a disabled employee who cannot perform the essential functions of his current position with reasonable accommodation but can perform the essential elements of another funded vacant position at the same grade level with or without reasonable accommodation, *Crumb* v. *Frank, Postmaster General, U.S. Postal Service*, 91 FEOR 3211 (1990); and (4) a disabled person who cannot perform the essential elements of his incumbent position or another position at the same grade level, with a reasonable accommodation, but can perform the essential elements of a funded vacant lower graded position with or without reasonable accommodation, *Vasquez* v. *Rice, Secretary, Department of the Army*, 90 FEOR 3028 (1989) *aff'd* 90 FEOR 3171 (1990).

a. The essential functions of the job

A function is essential if removing it would "fundamentally alter" the position, Appendix at p. 35743; *see School Board of Nassau County v. Arline*, 480 U.S. 273, 288, n.17 (1987) (case remanded to determine whether teacher fired from her position due to her susceptibility to tuberculosis could perform the essential functions of her position); *Foreman v. Babcock and Wilcox Co*.**,** 1997 U.S. App. Lexis 11977 (5th Cir. 1997) *(*a disabled employee must be able to perform the essential functions of the position in question before he is able to be considered a qualified individual with a disability and be covered by the ADA. Plaintiff was not a qualified disabled employee because he was unable to carry materials into the shop area which was an essential function of his job); *Gilbert* v. *Frank*, 949 F.2d 637 (2nd Cir. 1991) (applicant who could only lift 25 pounds could not perform the essential function of lifting up to 70 pounds required by the position); *Pesterfield* v. *Runyon, Tennessee Valley Authority*, 92 FEOR 7004 (6th Cir. 1991) (employee who was unable to accept criticism was not a qualified handicapped person); *Benitez v. West*, 96 FEOR 3023 (1996)(a GS-3 Data Transcriber suffering from depression was not a qualified disabled employee when he requested that her standards be lowered and that she retrained by another supervisor. "By lowering her standards, petitioner is asking that one of her essential functions of her position be eliminated, and such action is not required under the Rehabilitation Act); *Baker v. United States Postal Service,* 71 M.S.P.R. 680 (1996), (an agency must restructure a position to accommodate a disability by removing

nonessential functions the employee cannot perform, but such restructuring is not required if tasks the employee is unable to perform are essential to the job).

The determination of whether a function is essential must be based upon how the job is actually performed, *Lyles v. Department of Justice*, 96 FEOR 3098 (1996).

b. The meaning of reasonable accommodation

The Rehabilitation Act of 1973, like the Civil Rights Act of 1964, seeks to ensure equal employment opportunities based on merit. It does not guarantee equal results, establish quotas, or require preferences favoring handicapped individuals over those who are not handicapped. Appendix at p. 35739. "The agency is obligated not to discriminate against handicapped persons and to grant them reasonable accommodation; it is not required to treat them more favorably." *Avery* v. *Frank, Postmaster General, U.S. Postal Service*, 91 FEOR 3135 (1990).

"An accommodation is any change in the work environment or in the way things are customarily done that enables an individual with a disability to enjoy equal employment opportunities." Appendix to 29 C.F.R.§ 1630.2(o). What constitutes a reasonable accommodation is, of course, dependent on the circumstances of each case.

Such accommodations may include but are not limited to job restructuring, part-time or modified work schedules, acquisition or modification of equipment, the provision of readers and interpreters, and other similar actions. § 1614.203(c). This list is certainly not exhaustive.

An employer is not obligated to provide an employee the accommodation he requests or prefers, if an alternative reasonable accommodation is offered, *Schmidt v. Methodist Hospital*, 89 F.3d. 342 (7th Cir. 1996); *White v. Brown, Secretary, Department of Veterans Affairs*, 95 FEOR 1142 (1995)(employee with post concussion syndrome and PTSD was not entitled to accommodation of his choice, only a reasonable accommodation).

The bare assertion of an employee that an accommodation would be of assistance without any supporting evidence is insufficient to satisfy the employee's obligation to articulate a reasonable accommodation, *Robinson v. Department of the Air Force*, 77 MSPR 486 (1998)(in establishing a prima facie case of disability discrimination, the employee is not required to prove conclusively that specific job accommodations are reasonable, but must only make a facial showing that her disability can be reasonably accommodated. The bare assertion of an employee in an Editorial Assistant position suffering from cervical spondylosis that the agency "did not take precautions to make my working area safer to enable me to perform" and "at no time made preventions, after my job injury, to make the environment safer to alleviate my pain" did not constitute an articulation by the employee of a reasonable accommodation under which she could perform the necessary duties of her Editorial Assistant position).

The MSPB explained, however, that where a mechanism has been suggested that would limit the

job-related effects of an appellant's disability, it will look with some skepticism on an agency's claim that it could not afford to "risk allowing a **trial** of that mechanism", *Stevens v. Department of the Army,* 73 MSPR 619 (1997).

The fact that an agency has previously attempted to accommodate an employee does not necessarily foreclose future proposed accommodations. Prior accommodation efforts are only relevant insofar as they might indicate that future efforts to accommodate will likely be unsuccessful or that the cumulative efforts of the agency have placed an undue burden upon it at which point further accommodation becomes unreasonable, *McCray v. Department of Defense,* 68 M.S.P.R. 186 (1995).

Job restructuring is a frequently proposed accommodation. Job restructuring means "reallocating or redistributing nonessential, marginal functions." Appendix to 29 C.F.R. § 1630.2(o); *Saunders v. Dalton, Secretary, Department of the Navy,* 97 FEOR 3126 (1997)(EEOC remanded removal case back to the MSPB to determine, in part, whether the duties appellant could not perform were non-essential duties and whether his job could be restructured to eliminate those duties); *Overton v. Reilly,* 977 F.2d 1190 (7th Cir. 1992) (case remanded to district court to determine whether employee suffering from depression held a position (chemist) which could be restructured, despite the fact that his position required contact with the public, where public contact constituted only five percent of his job and there was some evidence that at least one other person in the employee's unit performed his job without having any contact with the public).

However, an accommodation request that proposes the elimination of an essential function is not a reasonable accommodation, *Saunders v. Dalton, Secretary, Department of the Navy,* 97 FEOR 3126 (1997); *Brown v. Frank, Postmaster General, U.S. Postal Service,* 92 FEOR 3006 (1991) *citing Carter v. Bennett,* 651 F.Supp.1299 (D.D.C. 1987); *Gilbert* v. *Frank,* 949 F.2d 637 (2nd Cir. 1981) ("Reasonable accommodation does not mean elimination of any of the job's essential functions . . ."); *Mackay* v. *United States Postal Service,* 607 F.Supp.271, 279 (E.D. Pa. 1985) (an accommodation is not reasonable if it would require "substantial modification in the requirements of the position at issue").

Another reasonable accommodation might be altering the environment in which the employee performs his job. *Langon* v. *Department of Health and Human Services,* 959 F.2d 1053 (D.C. Cir. 1992) (case was remanded to district court to determine whether computer programmer with multiple sclerosis could have been reasonably accommodated by permitting her to work at home rather than removing her);[3] *Arneson* v. *Sullivan,* 946 F.2d 90 (8th Cir. 1991) (employee with

---

[3]But see *Vande Zande* v. *State of Wisconsin, Department of Administration,* 44 3.d 538,544-545 (7th Cir. 1995), which finds that working at home is not usually a reasonable accommodation and describes *Langon* as a minority view. It should be noted, however, given the Department's policy permitting flexiplace in certain jobs, that working at home may be determined by a third party to constitute a reasonable accommodation: depending on the job, the disability, the number of days needed to work at home each week and the expected duration of the accommodation (months or

apraxia whose main problem was distractibility was discriminated against when the agency removed the appellant rather than offer him, as a reasonable accommodation, an environment with minimal distractions and a reader).

A reasonable accommodation might require altering the way things are traditionally done to meet the needs of the disabled employee, *Stevens v. Army*, 73 MSPR 619 (1997)(appellant with learning disability which caused him to be AWOL could be reasonably accommodated by altering the leave procedures which would permit appellant's sister to call the supervisor on appellant's behalf, whenever he planned to be absent). The MSPB will look with a skeptical eye where the appellant requests a reasonable accommodation and the agency rejects it out of hand without providing a trial period to evaluate the request. *Id.*

Sometimes the accommodation might require putting up with certain behavior caused by the disability that might not otherwise be acceptable in a person without a disability. *Overton* v. *Reilly*, 977 F.2d 1190 (7th Cir. 1992) (employee who occasionally took unscheduled naps as a result of his medication could still be considered a qualified disabled employee, since despite the naps he still got his work done, his position of chemist did not require "full-time vigilance" and there was no evidence that such a problem would render him "unfit").

The agency should be careful to determine whether there is a nexus between the requested accommodation and the employee's disability. An accommodation should meaningfully address those barriers which make it difficult for the employee to perform because of his/her disability. *Feris v. Browner, Administrator, Environmental Protection Agency,* 97 FEOR 3021 (1997)(agency's provision of a temporary interpreter for its deaf employees was not a reasonable accommodation since the frequent need for an interpreter required hiring a full time interpreter that would be more readily available to serve the needs of the deaf community). An agency is under no obligation to grant a request for an accommodation unrelated to the employee's disability. *Carr* v. *Thornburgh, Attorney General, Department of Justice*, 91 FEOR 3247 (1990).

When the agency offers the employee an accommodation that differs from the requested accommodation, the agency must demonstrate that there is a meaningful nexus between its offer and the employee's disability. *Carr* v. *Thornburgh, Attorney General, Department of Justice*, 91 FEOR 3247 (1990). The agency should also be prepared to show that the accommodation would assist the employee perform the essential functions of the position in question, *Feris v. Browner, Administrator, Environmental Protection Agency*, 97 FEOR 3021 (1997); *Brown* v. *Frank, Postmaster General, U.S. Postal Service*, 92 FEOR 3006 (1991) *citing Carter* v. *Bennett*, 651 F.Supp.1299 (D.D.C. 1987).

A common mistake is for an agency not to consider accommodating an individual until it determines whether he/she is a qualified individual with a disability. In so doing, the agency

---

years).

erroneously treats the obligation to consider reasonable accommodations as separate and apart from the definition of a qualified disabled employee. *Gilbert* v. *Frank*, 949 F.2d 637, 641 (2nd Cir. 1991), *citing, School Board of Nassau County* v. *Arline*, 480 U.S. 273, 288 (1987); *Hall* v. *United States Postal Service*, 857 F.2d 1073, 1078 (6th Cir. 1988) (the qualified disabled person inquiry requires consideration of more than whether the disabled person can perform the job's essential functions, but also whether a reasonable accommodation by the employer would enable the disabled person to perform those functions).

The very definition of a qualified individual with disabilities incorporates the concept of reasonable accommodation: "an individual with disabilities who *with or without reasonable accommodation* can perform the essential functions of the position in question . . ." (Emphasis added). 29 C.F.R § 1614.203(a)(6). Thus in deciding whether the employee is a qualified individual with disabilities, the agency must explore whether it can accommodate the employee's disability so that he/she can perform the essential functions of the position in question, *Saunders v. Dalton, Secretary, Department of the Navy*, 97 FEOR 3126 (1997): *Crumb* v. *Frank, Postmaster General, U.S. Postal Service*, 91 FEOR 3211 (1990).

c. Reassignment as a reasonable accommodation

A qualified individual with disabilities is an "individual with disabilities who with or without reasonable accommodation can perform the essential functions of the *position in question*. . ." (Emphasis added). Section 1614.203(a)(6). "Position in question" refers not only to the employee's current position but also to a position the employee could have been reassigned to as a result of a reasonable accommodation.

> . . . the word "position" as well as the phrase "position in question" under our regulations encompass a broader meaning . . . . Specifically, we hold that the position in question is not limited to the position occupied by or held by the complainant, but also includes the position the complainant could have held as a result of a reasonable accommodation.

Ignacio v. *U.S. Postal Service*, 84 FEOR 3159 (1984), *aff'd* Special Panel No. 1, 86 FEOR 5055 (1986). As a result of the Special panel decision in *Ignacio*, the Merit Systems Protection Board follows this same liberal interpretation of qualified individual with a disability. *Ellis* v. *U.S. Postal Service*, 37 M.S.P.R. 503 (1988).

The current EEO regulations codify *Ignacio* v. *United States Postal Service, supra*. 29 C.F.R. § 1614.203(g). This regulation provides that when a nonprobationary disabled employee is unable to perform the essential functions of his job, even with a reasonable accommodation, the agency shall offer to reassign the individual to a funded vacant position, located in the same commuting area, serviced by the same appointing authority, and at the same grade or level, if the employee can be expected to perform the essential functions of the position with or without reasonable accommodation. Reassignment is not required where it would cause an undue hardship on

agency operations.

Thus, an agency has an affirmative obligation to consider reassignment as a reasonable accommodation. An employer should first explore accommodating the employee's current position prior to considering reassignment, *AKA v. Washington Hospital Center***,** 1997 U.S. App. Lexis 14890 (D.C. Cir. 1997). Failure to consider reassignment may result in a finding of discrimination. *Jackson v. United States Postal Service***,** 73 MSPR 512 (1997); *Randel v. Dalton, Secretary, Department of the Navy***,** 96 FEOR 3230 (1996) (the agency violated the Rehabilitation Act when it removed appellant who suffered from Major Depression and was having problems concentrating and relating to his supervisor, without first conducting a "systematic search for vacant positions based upon petitioner's qualifications and his medical restrictions"); *Crumb* v. *Frank, Postmaster General, U.S. Postal Service,* 91 FEOR 3211 (1990).

The agency had a duty to explore reassignment of appellant to a funded vacant position located in the same commuting area and serviced by the same appointing authority, and at the same grade or level, the essential functions of which the appellant would be able to perform with reasonable accommodation unless the agency could show the reassignment would cause it an undue hardship, *Phillips v. Department of the Navy*, 67 M.S.P.R. 74 (1995); *McLean* v. *Department of the Army*, 36 M.S.P.R. 405 (1988) (agency erred when it failed to consider restructuring certain vacant positions to accommodate appellant's medical restrictions).

The agency does not have to consider every possible reassignment or find petitioner her ideal job, *Wernick v. Federal Reserve Bank*, 91 F.3d 379 (2nd Cir. 1996) ; *Robertson* v. *Stone, Secretary, Department of the Army*, 91 FEOR 3179 (1990); *Jones* v. *Department of the Army*, 35 M.S.P.R. 691 (1987). Nor is the agency required to "displace other employees in attempting to reasonably accommodate petitioner where doing so would impose an undue hardship upon its operations." *Robertson*, *supra*; *Savage* v. *Department of Navy*, 36 M.S.P.R. 148 (1988). There is no obligation to create a position if none exists, C*ole v. Runyon, Postmaster General, U.S. Postal Service*, 97 FEOR 3095 (1997) ; *Malbough* v. *Department of the Army*, 43 M.S.P.R. 588 (1990). The employee is not entitled to a promotion, *Clopton* v. *Department of the Navy*, 36 M.S.P.R. 373, 378-379 (1988); a full time position if the employee was originally hired into a part-time position, *Patrick* v. *Department of the Air Force*, 39 M.S.P.R. 392, 397 (1988); or a reassignment from a non-competitive position to a competitive position, *Johnson* v. *Department of the Navy*, 39 M.S.P.R. 451 (1989). In other words, the employee is generally not entitled to a position with more rights and benefits,.*Sheehan v. Department of the Navy***,** 66 M.S.P.R. 490 (1995); *Patrick, supra*. However, the MSPB reversed an agency when it refused to offer an employee a vacant position he was well qualified for and which had promotion potential to a higher grade than the position the appellant held in the agency. *Sheehan, supra.*

The disabled person is not entitled to be reassigned to a position for which he or she is not qualified, *Phillips v. Department of the Navy*, 67 M.S.P.R. 74 (1995); *Maas* v. *Derwinski, Secretary, Department of Veterans Affairs*, 90 FEOR 3290 (1990) (an employee was properly removed from her food service position when, as a result of a severe foot problem she could no

longer perform the position and was either unqualified for other positions or was unwilling to take a pay cut); *Clopton* v. *Department of the Navy*, 36 M.S.P.R. 373 (1988) (employee failed to prove that she was qualified for a reassignment to a professional position).

The agency is obligated to consider reassignment only to "funded vacant positions located in the same commuting area and serviced by the same appointing authority" (i.e. personnel office) that appointed the employee to his or her incumbent position, *Santos v. U.S. Postal Service*, 95 FEOR (1995); 29 C.F.R. § 1614.203(g).

Section 1614.203 requires that if the agency has already posted a notice or announcement seeking applications for a specific vacant position at the time the agency has determined that the employee cannot perform the essential functions of his or her job, then the agency does not have an obligation to offer to reassign the employee to that position. However, the agency must consider the individual on an equal basis with those who applied for the position.

Reasonable accommodation for applicants does not include reassignment to a position that the individual did not apply for. *Neve* v. *Baker, Secretary, Department of State, supra*; *see Appendix* at p. 35744; § 1614.203(g). Nor need the agency consider reassignment for a probationary employee. Section 1614.203(g).

d. Demotion as a reasonable accommodation

Voluntary demotion is a reasonable accommodation only when there are no positions at the same grade level for which the employee is qualified and can perform the essential functions, *O'Connell v. United States Postal Service***,** 69 M.S.P.R. 438 (1996); *Vasquez* v. *Rice, Secretary, Department of the Army*, 90 FEOR 3028 (1989) *aff'd* 90 FEOR 3171 (1990) (employee who suffered from serious allergies and was unable to work in his position as an aircraft mechanic was properly demoted to a lower graded position because "an agency is obligated to make a **reasonable** accommodation, not one that is totally acceptable to the complainant") (emphasis included); *Maas* v. *Derwinski, Secretary, Department of Veterans Affairs*, 90 FEOR 3290 (1990) (an employee was properly removed from her food service position when, as a result of a severe foot problem, she could no longer perform the position and was either unqualified for other positions or was unwilling to take a pay cut); *see Vasquez, supra, citing Laws* v. *Pennsylvania*, 412 A.2d 1377 (Commw. Ct. 1980) ("where employee could no longer do field work, employer's offer of an in-office clerical job at **substantially lesser pay** satisfied employer's obligation of reasonable accommodation") (emphasis added).

In fact, where no position at the same grade is available, a demotion is required by EEO regulations. "In the absence of a position at the same grade or level, reassignment to a vacant position at the highest grade or level below the employee's current grade or level shall be required . . ." 29 C.F.R. § 1614.203(g).

3. Determining whether the requested accommodation would cause an undue hardship

As previously discussed, if the complainant has established a *prima facie* case that there are plausible reasons to believe that with reasonable accommodation he or she can perform the essential functions of the position in question, the agency may rebut this assertion by showing that it did provide the complainant such a reasonable accommodation or that a reasonable accommodation is not possible.

Another defense is that the accommodation would cause an undue hardship on the agency. The agency is not required to provide an accommodation that would "impose an undue hardship on the operations of its program." 29 C.F.R. § 1614.203(c)(1). Factors in determining whether an accommodation would cause an undue hardship include:

> (1) The overall size of the agency's program with respect to the number of employees, number and type of facilities and size of budget;
>
> (2) The type of agency operation, including the composition and structure of the agency's work force; and
>
> (3) The nature and the cost of the accommodation.

29 C.F.R. § 1614.203(c)(3).[4]

"The undue hardship standard . . . is a rigorous one under the Rehabilitation Act . . . ." *Schneider* v. *Frank, Postmaster General, U.S. Postal Service*, 89 FEOR 3057 (1988) (agency failed to prove that providing a stool to an employee with a chronic nerve disorder, which would have eliminated any pain while sorting through the mail, would have caused an undue hardship.) "Merely articulating" that a requested accommodation would pose an undue hardship on the agency is not enough. The agency must present "credible evidence that reasonable accommodation is not possible or practical." *Id*. *See Lee* v. *Frank, Postmaster General, U.S. Postmaster General, U. S. Postal Service*, 88 FEOR 3221 (1988).

Mere inconvenience or unfairness is not enough to establish undue hardship. The burden is on the agency to show that the accommodation sought (e.g. using temporary help or redistributing the workload) would have been unduly costly or burdensome or would have restructured the position such that the essential functions would have to be performed indefinitely by co-workers *Taylor v. Daley, Secretary of Commerce*, 97 FEOR 1323 (1997), (the EEOC found that the

---

See also the ADA regulations which explains that an accommodation causes an undue hardship if it is "unduly costly, extensive, substantial or disruptive, or fundamentally alter the nature or operation of the business." Appendix at p. 35744.

proposed accommodation of a disabled employee [incomplete paralysis] to build a level covered passage between two buildings would cause an undue financial burden on the agency. The cost of the project was $500,000.00 and the agency was already over its building construction/maintenance budget); *Feris v. Browner, Administrator, Environmental Protection Agency***,** 97 FEOR 3021 (1997)(the agency was unable to establish that hiring a full-time interpreter would cause an undue hardship, despite its assertions of a budget freeze); *Jewell* v. *Brady, Secretary, Department of the Treasury*, 89 FEOR 3177 (1989) (frequently absent discharged clerk typist with back and knee disabilities was subjected to handicap discrimination where a reasonable alternative to discharge was available, e.g. using temporary help or redistributing the workload to co-workers during the employee's temporary and planned absences.)

The existence of an undue hardship is determined on a case by case basis, *AKA v. Washington Hospital Center***,** 1997 U.S. App. Lexis 14890 (D.C. Cir. 1997); *Stith* v. *Secretary of Housing and Urban Development*, 88 FEOR 3204 (1988) (holding a position open and vacant for an indefinite period of time constitutes undue hardship); *Franklin* v. *U.S. Postal Service*, 87 FEOR 3087 (1987) aff'd 88 FEOR 5073 (D.C. S.D. Ohio 1988) (the necessity for an "endless series of accommodations" as a result of an employee's failure to take his medication constitutes an undue hardship); *Brown* v. *Rice, Secretary, Department of the Air Force*, 90 FEOR 3322 (1990) (the agency properly RIFed complainant because requiring the agency to purchase and install 100 TDD or Fax machines in order to accommodate his hearing disability was not reasonable and would impose an undue hardship on the agency). Moreover, it is an undue hardship to assign a handicapped employee to perform the essential functions of a position he or she is unable to perform, *Day* v. *Stone, Secretary, Department of the Army*, 92 FEOR 3069 (1991) (employee suffering from a mental handicap was properly removed when she was not qualified for any vacant positions or could not perform the essential functions of any vacant positions because they were too stressful).

Accommodating an employee's egregious conduct, particularly involving health and safety, may constitute an undue hardship. *Davis* v. *West*, 94 FEOR 3224 (1993) (alcoholic employee who almost hit two tourists when driving on duty while intoxicated, was properly removed since accommodation would have caused an undue hardship and would have undermined the public's faith and confidence in the agency); *Scofield* v. *Bentsen, Secretary, Department of the Treasury*, 94 FEOR 3158 (1993) (special agent of Alcohol Tobacco and Firearms was properly removed after he was found to have misused a government vehicle and pled nolo contendere to one charge of assault and one charge of driving under the influence of alcohol, since accommodating the employee through a firm choice would cause an undue hardship given the high standard of conduct and judgement required of a special agent and accommodating the employee after his serious misdeeds would compromise the faith and confidence of the public).

4. Addressing requests for accommodation

When a qualified disabled employee requests an accommodation, the agency must make a

reasonable effort to provide an accommodation that is effective for the individual, that is, that allows the individual to perform the essential functions of the job or enjoy equal benefit and privileges in the workplace as non-disabled employees. In many cases an appropriate accommodation will be obvious and can be made without difficulty and at little or no cost. Often, the disabled person can suggest a minor change or adjustment to his job or work environment that makes perfect sense to the supervisor. The supervisor should be encouraged to simply grant the accommodation request in consultation with the personnel office.

EEOC requires that the employer consult the person with the disability as the first step in considering an accommodation. The ADA [and the Rehabilitation Act] and its implementing regulations require that the parties engage in an interactive process to determine what precise accommodations are necessary, *Beck v. University of Wisconsin Board of Regents*, 75 F.3d 1130, 1135-37 (7th Cir. 1996). Both parties bear responsibility for determining what accommodation is necessary. In the event the interactive process fails, the court shall determine which party is responsible for the breakdown and then assign responsibility for the failure in deciding whether the employer's decision to deny the accommodation was warranted. *Beck* was recently cited with approval by the MSPB in *Clark v. United States Postal Service*, 74 MSPR 552, 562 (the parties are required to make a good faith effort to work together to determine what constitutes a reasonable accommodation). Thus, it is very important for the agency to make a real effort to consult with the employee upon receipt of an accommodation request.

The employee's request for accommodation may involve inaccurate assumptions about his or her job and the work site. The supervisor may not know enough about the employee's limitations in relation to his or her specific job tasks to properly evaluate the accommodation request.

The EEOC envisions a process where supervisor and employee work together to identify the appropriate accommodation. The EEOC recommends that the employer:

1. Look at the particular job involved. Determine its purpose and essential functions.

2. Consult with the employee to find out his or her specific physical or mental abilities and limitations as they relate to the essential job functions. Where the nature of the disability and/or employee limitations are unclear, the employer may require the employee to provide a letter from his or her doctor to support the request. Identify the barriers to job performance and assess how these barriers could be overcome with an accommodation.

3. In consultation with the employee, identify potential accommodations and assess how effective each would be in enabling the individual to perform the essential job functions.

4. If there are several effective accommodations that would provide equal

> employment opportunity, consider the preference of the employee and select the accommodation that best serves the needs of the individual and the agency. While the agency should consider the employee's preference, it is free to choose among effective accommodations and may choose one that is less expensive or easier to provide.

A Technical Assistance Manual of the Employment Provisions (Title I) of the Americans With Disabilities Act, U.S. Equal Employment Opportunity Commission, January, 1992; Appendix to 29 C.F.R. § 1630.9.

The supervisor should take this process very seriously. Evidence that the agency made a good faith effort to accommodate an individual with disabilities will eliminate, as a remedy, compensatory damages should the employee prove that he or she could have been reasonably accommodated.

Generally, the supervisor should consult with the employee to find out what the employee's specific physical or mental abilities and limitations are as they relate to the essential job functions. The supervisor and employee should jointly explore the barriers to job performance and how these barriers could be overcome either with the requested accommodation or an alternative accommodation. By following this practical approach, the supervisor will be in good standing to defend his decision in a disability discrimination case.

Putting this process to work can be very simple. Where it is undisputed that the employee has a disability, requests an accommodation, and the need for the accommodation is apparent, the agency should grant the request. For example, if an employee who is known to have a bad back requests an ergonomic chair as an accommodation, the agency should grant the request.

Where the employee requests an accommodation but the nature of the disability or the basis of the request for accommodation is unclear, the same consultative process is appropriate. However, in such a case the supervisor may find it helpful to get a medical opinion from the employee's doctor. If the recommendations of the doctor appear reasonable, the agency should grant the request.

The process gets more complex where the supervisor seriously questions the existence of the alleged disability, questions the reasonableness of the accommodation request, is hard pressed to identify an alternative accommodation, or believes that the request would cause an undue hardship on agency operations. In such situations the supervisor must be extremely cautious not to give the employee the impression that he or she is discounting the request or merely going through the motions of considering the request. Even a request that appears ludicrous on its face should be taken seriously by the supervisor.

In these more difficult cases, the supervisor should listen carefully to the employee's explanation of his specific physical or mental disabilities and limitations and how the request would assist the employee to overcome the identified workplace barrier. The employee should be treated with

respect. He or she should be questioned but not "grilled."

If there are questions about the existence and or nature of the alleged disability or the appropriate reasonable accommodation, the supervisor should request medical documentation, including a written opinion from the employee's doctor. In order to obtain helpful information from the doctor the supervisor should draft a letter containing specific questions designed to elicit the required information. Examples of questions which could be included are set forth in 5 C.F.R. § 339.104; however, the questions should be tailored to the particular case. A copy of the employee's position description and performance standards should be enclosed with the letter.

Upon receipt of the written opinion, the supervisor may find that the medical evidence does not support the employee's request or that the doctor proposes an alternative accommodation that makes sense and is acceptable to the supervisor. Where the supervisor issues a decision that is consistent with the employee's doctor's recommendations, his or her decision will likely withstand third party review in the event the employee files a complaint or grievance.

More often than not, however, the employee's doctor will support the employee's request. The supervisor's impulse might be to disregard the doctor's advice, and issue a decision rejecting the accommodation based upon what he or she believes is "common sense." If the supervisor falls prey to this impulse his decision will likely be found to be a reflexive reaction to the employee's medical condition rather than a reasoned decision based on medically sound judgements.

The Department of Labor's internal regulations on reasonable accommodation for individuals with handicaps at DLS Appendix G, FPM Chapter 306, set forth the procedures DOL supervisors must follow in considering requests for accommodation. No decision regarding a request for accommodation should be made without reference to DLS 306. If the agency wishes to issue a decision denying a request for accommodation, DLS 306 requires that the decision be reviewed by DCR prior to issuance.

Before an agency issues a decision that is inconsistent with the employee's doctor's recommendations, the agency should obtain another medical opinion. DLS 306 provides an avenue for the agency to seek an impartial second medical opinion. DCR, which has a contract with the Public Health Service (PHS), will forward the medical evidence to the PHS. The PHS will review the medical documentation and provide an impartial medical opinion as to whether the employee's doctor's recommendations are based on medically sound judgements. The PHS may also recommend alternative accommodations or even indicate that the employee is not a qualified individual with a disability. If the agency issues a decision that is consistent with the PHS recommendations, there is a good chance that the decision will be sustained in the event that the matter is presented for third party review.

The most complex scenario involves a situation where the supervisor believes that even with reasonable accommodation, the employee cannot perform the essential functions of his or her job. Such a case usually involves performance or conduct problems where removal or demotion is

proposed. In some cases agency officials first become aware of the employee's physical or mental impairment during the oral reply stage after the issuance of a proposed adverse action.

In such a case, the supervisor should proceed to follow the consultative process outlined above. However, he or she must be especially cautious to treat the employee's request for accommodation with respect and ensure that any decision that may result in the employee's removal or downgrade is based on both agency need and medically sound judgements.

Accordingly, the supervisor should gather all relevant medical information from the employee, including a response to the questions from the employee's doctor. If the supervisor wishes to issue a decision inconsistent with the employee's doctor or just wants a second opinion, he or she must contact DCR who will in turn arrange for the PHS to review the medical information and issue its own assessment of the employee's medical condition and how it affects his or her ability to perform the essential functions of the job.

If it is determined that the employee cannot perform the essential functions of his or her current job, even with accommodation, the evaluation and consultative process does not end. At that point the supervisor needs to obtain assistance from the personnel office. The **personnel office**, not the supervisor, should then identify all vacant positions for which the employee is **qualified** (i.e. possessing the requisite knowledge, skills, abilities and experience to qualify him for the job) at the employee's **current grade level** located within the same commuting area as his current position, and serviced by the same personnel office. An employee who does not satisfy the OPM requirements for a particular position is not qualified for the position. The reason the personnel office and not the supervisor should determined whether the employee is qualified for another position and meets the OPM requirements is because the personnel office has the expertise to make such determinations.

If it is determined that the employee is qualified for a vacant position at his current grade, the personnel office must determine, with the assistance of the relevant supervisor, what the essential functions of the position are. It must then be determined, in light of the medical evidence, whether the employee can perform the essential functions of the vacant position with or without reasonable accommodation.

If after these considerations, reassignment to a vacant position at the employee's current grade appears to be an available alternative, the supervisor should propose it to the employee. The agency should consider the employee's preference where there is more than one vacant position available; however, the agency satisfies its obligation if it offers a reassignment within the same commuting area as the employee's current position.

If there are no vacant positions at the employee's current grade level, the agency should determine if the employee is qualified for a vacant position, located within the same commuting area as his current position, and serviced by the same personnel office, at the highest available grade below the employee's current grade.

If it is determined that the employee is qualified for a vacant position, the personnel office must determine, with the assistance of the relevant supervisor, what the essential functions of the position are. It must then be determined, in light of the medical evidence, whether the employee can perform the essential functions of the vacant position with or without reasonable accommodation. If a demotion is the only available alternative, the agency should explain this to the employee and offer it to him or her as a reasonable accommodation. If the employee rejects this offer, the agency can then demote or remove the employee in accordance with adverse action procedures.

5. Job-related medical standards

Some agencies, such as MSHA and OSHA, require applicants and employees to submit to pre-employment physical examinations and fitness for duty examinations to determine whether they are mentally and physically capable of performing the job.[5] Complaints arise in failure to hire, non-promotion and termination cases, where the agency finds that as a result of an actual or perceived impairment, the individual is unsuitable to perform the position because the employee failed to meet the medical standards for the position. Failure to meet such standards is not enough to discharge an employee or refuse to hire and applicant. The agency must first determine if the medical standard is job-related. *Flynn-Banigan v. Reno, Attorney general, Department of*

The authority to conduct such medical examinations is set forth at § 1614.203(e) which provides:

> (e) *Preemployment inquiries.* (1) Except as provided in paragraphs (e)(2) and (e)(3) of this section, an agency may not conduct a preemployment medical examination and may not make preemployment inquiry of an applicant as to whether the applicant is an individual with handicaps or as to the nature or severity of a handicap. An agency may, however, make preemployment inquiry into an applicant's ability to meet the essential functions of the job, or the medical qualifications requirements if applicable, with or without reasonable accommodation, of the position in question, i.e. the minimum abilities necessary for safe and efficient performance of the duties of the position in question . . .
>
> (2) Nothing in this section shall prohibit an agency from conditioning an offer of employment on the results of a medical examination conducted prior to the employee's entrance on duty, provided that: all entering employees are subjected to such an examination regardless of handicap or when the preemployment medical questionnaire used for positions that do not routinely require medical examination indicates a condition for which further examination is required because of the job-related nature of the condition, and the results of such an examination are used only in accordance with the requirements of this part . . . .

Justice, 96 FEOR 3104 (1996) (refusal to hire an applicant for Border Patrol Agent solely because he did not meet the medical standard of 20/70 uncorrected vision was remanded for further investigation to determine, in part, whether such a standard which established a "blanket exclusion" was job-related; *EEOC v. Chrysler Corporation***,** 917 F.Supp. 1164 (E.D.Mich. 1996)(Chrysler's policy of excluding from employment any individual with a blood sugar level of greater than 140 mg/dl. was found to violate the ADA. Chrysler failed to make the requisite individual assessment of an applicant's qualifications when it imposed this exclusionary policy); *Baitey* v. *Frank, Postmaster General, U.S. Postal Service*, 92 FEOR 1092 (1992); *Loptrone, et al*., 91 FEOR 3338 (1991) (agency discriminatorily used a hearing profile requirement to deny appellants positions for which they applied. Although there was unrefuted testimony of an agency audiologist that there was an "extremely high" probability of future hearing loss if they were hired, the agency failed to rebut appellants' suggestions that with certain hearing protection devices they could perform the job safely).

In some cases the agency can require further medical evidence beyond the initial medical examination, including a second medical examination, in order to determine whether the individual is a qualified disabled person. a second exam is appropriate where there is insufficient evidence after the first examination to make such a determination. The individual's failure to submit to a such an examination could foreclose a finding of disability discrimination, *Owens* v. *Frank, Postmaster General, U.S. Postal Service*, 92 FEOR 3028 (1992). However, EEOC has made a finding of discrimination in a case where an agency made a final decision that an individual was unsuitable based on an insufficient examination, even though after the agency's decision the employee, during the appeals process, refused to submit to a second examination. *Jeanmarie* v. *U.S. Postal Service*, 87 FEOR 3396 (1987).

6. Medical Inability to Perform and Direct Threat

An agency decision not to hire an applicant or to remove an employee based upon a risk of future injury requires a "direct threat" analysis. Because few, if any, activities in life are risk free, the law does not ask whether a risk exists, but whether it is significant. The existence, or nonexistence of a significant risk must be determined from the standpoint of the person who refuses to give the treatment or make the accommodation. But that risk assessment must be based upon medical or other objective evidence. *Brangdon v. Abbott*, 66 USLW 4601 (June 25, 1998) 1630.2(r) defines direct threat as follows:

> *Direct Threat* means a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation. The determination that an individual poses a "direct threat" shall be based on an individualized assessment of the individual's present ability to safely perform the essential functions of the job. This assessment shall be based on a reasonable medical judgement that relies on the most current medical knowledge and/or the best available objective evidence. In determining whether an individual would pose a direct threat, the factors to be considered include:

(1) The duration of the risk;
(2) The nature and severity of the potential harm;
(3) The likelihood that the potential harm will occur; and
(4) The imminence of the potential harm.

A lead case where the prospect of future injury is at issue is *Mantolete* v. *Bolger*, 767 F.2d 1416 (9th Cir. 1985). *Mantolete* provides:

> We hold that in order to exclude such individuals there must be a showing of a reasonable probability of substantial harm. Such a determination cannot be based merely on an employer's subjective evaluation, or except in cases of a most apparent nature, merely on medical reports. The question is whether, in light of the individual's work history and medical history, employment of that individual would pose a reasonable probability of substantial harm . . . .
>
> Such an evaluation necessarily requires the gathering of substantial information by the employer . . . .
>
> In applying this standard, an employer must gather all relevant information regarding the applicant's work history and medical history, and independently assess both the probability and severity of potential injury. This involves, of course, case-by-case analysis of the applicant and the particular job.

Mantolete v. *Bolger*, 767 F.2d 1416, 1421-1423. Thus, the agency must carefully assess whether the individual can perform the job safely, based not on generalizations of the employee's disability but in light of the particular medical condition of the individual. *Equal Employment Opportunity Commission v. Amego Inc.,* 110 F.3d 135 (1st Cir. 1997)(medical professional who improperly dispensed medications to her patients constituted a direct threat to the health and safety of her patients); *Moses v. American Nonwovens, Inc*., 97 F.3d 446 (11th Cir. 1996), cert. denied, 117 S. Ct. 964 (1997), (upheld the removal of a former employee who had epilepsy because the employee's continued employment would have posed a direct threat. The former employee did not dispute that there was a significant risk that he would have had seizures on the job. The court found that there was a substantial risk that the employee would be injured because his job was performed in the vicinity of heavy machinery); *Spencer v. Department of the Navy*, 73 MSPR 15 (1997)(there was no evidence that employee who suffered from sleep apnea posed a direct threat to himself or others); *Curry v. West, Secretary, Department of the Army*, 96 FEOR 1100 (1995)(a decision not to hire because of a predicted future injury must be based upon more than an elevated risk of injury, but on a reasonable probability of substantial harm if the employee performs the job. There must be an individualized assessment of appellant's condition taking into account the nature and duration of the risk, its severity [i.e. potential harm] and the probability of it occurring. The imminence of the risk should be considered as part of assessing its probability. The agency failed to prove a reasonable probability of substantial harm and therefore discriminated against the appellant); *Dimiceli* v. *Frank, Postmaster General, U.S. Postal Service,*

91 FEOR 3053 (1990) (standing a greater chance of developing arthritis and experiencing some pain in the performance of one's duties does not rise to the level of a reasonable probability of substantial harm as required by *Mantolete*); *Cook* v. *Frank, Postmaster General, U.S. Postal Service*, 90 FEOR 3180 (1990) (letter carrier with osteoarthritis of the left hip who was required to walk five miles a day was discriminated against when he or she was found unsuitable for his job based only on three medical reports that concluded that the appellant experienced pain when walking, the walking "may" have a detrimental effect and "perhaps" lead to severe osteoarthritis, and that walking would most likely make appellant's condition worse but did not establish the degree to which it would worsen, since such medical reports are not sufficient individually or in conjunction to support a conclusion that there was a reasonable probability of substantial harm); *Ceschini* v. *Frank, Postmaster General, U.S. Postal Service*, 88 FEOR 3220 (1988) (employee was improperly terminated from her position as distribution clerk, despite prior back problems, where agency failed to provide an individualized assessment of the appellant's condition in that even if 90% of all employees with appellant's impairment would suffer recurrent back problems, this does not mean that the individual would suffer similar problems).

An employee may also be removed for medical inability to perform based upon observed deficiencies in conduct and performance, supported by medical evidence that the appellant cannot perform the job. *Spencer v.Department of the Navy*, 73 MSPR 15 (1997) Evidence that an employee's performance and conduct on the job has been acceptable is evidence that appellant is not a direct threat in the workplace and/or that appellant is medically fit to perform the essential functions of the job, *Spenser v Department of the Navy*, 73 MSPR 15 (1973)*; Yates v. U.S. Postal Service*, 70 M.S.P.R. 172 (1996).

In *Clark v. Postal Service*, 74 MSPR 552 (1997), a physical inability to perform case, the MSPB did not focus on appellant's observed deficiencies in the workplace or conduct a "direct threat" analysis. Rather, the MSPB simply examined whether the appellant, who failed his fitness for duty examination due to his back impairment, was capable of performing the essential functions (bending and lifting) of his Mail Processor position with a reasonable accommodation. The MSPB concluded that appellant articulated a reasonable and obvious accommodation (raising the mail cart or that the mail trays be placed on the top shelf with the bottom weighed down with telephone books) and that the agency did not show that such an accommodation would cause an undue hardship.

In *Clark* the MSPB noted that the notice of proposed removal contained only general responses to the appellant's suggested modifications, and did not cite to any ergonomic, medical or cost-related evidence that would support the conclusion that the suggested accommodations would impose an undue hardship. They MSPB found that the supervisors made no effort to come up with alternative accommodations, made no meaningful effort to consider medical reports that corroborated appellant's accommodation request and, in effect, did not take their role in the accommodation process very seriously.

Accordingly, an agency should not remove an employee for medical inability to perform until it

has carefully examined the employee's reasonable accommodation request and explored any alternative accommodations which would permit the appellant to perform the essential function of the position in question.

7. Selection criteria that screen out disabled persons

Section 1614.203(d) is not limited in applicability to medical suitability cases. Any selection process which unfairly screens out disabled employees violates this regulation, even if medical suitability is not at issue. Thus, in *Fox* v. *Runyon, Postmaster General, U.S. Postal Service*, 92 FEOR 1112 (1992), the EEOC found that the utilization of an oral interview process in determining whether to promote custodial laborers violated § 1613.705(a) [now § 1614.203(d)] because it screened out disabled persons and the agency failed to show that the interview process was a job-related technique. Specifically, a mentally impaired level 2 laborer with a very low IQ applied for a level 3 laborer position. The agency instituted an oral interview process prior to making its selection. The EEOC determined that because the appellant did poorly in the interview, he did not get the job. The EEOC concluded that the appellant could have performed the higher level job had he been promoted into it. The EEOC explained:

> Once appellant establishes his *prima facie* case of handicap discrimination, the burden falls upon the agency to rebut appellant's *prima facie* case. The agency, however, must articulate more than a legitimate, nondiscriminatory reason for its actions. EEOC Regulation 29 C.F.R. § 1613.705(a) [must be satisfied].

Id. Since the agency had failed to prove that the interview process which screened out handicapped persons was job related, and since the previous selection process which had not included an interview was satisfactory, the agency discriminated against the mentally impaired appellant when it failed to hire him. *Id*.

Thus, the agency should take care to ensure that all of its selection processes are job related and do not screen out disabled employees. *Id*.

8. Alcoholism as a disability

The MSPB and the EEOC have long held and continue to hold that alcoholism is a disability. However, the obligation to accommodate an alcoholic who has engaged in alcohol induced misconduct has changed dramatically.

Under previous case law, if the employee proved that there was a causal relationship between his disability of alcoholism and his misconduct, the agency would first have to show that it offered the employee a "firm choice" between treatment and removal prior to initiating a disciplinary action. *See Harris* v. *Department of the Army*, 57 M.S.P.R. 124, 127 (1993); *Ray v. Department of Housing and Urban Development*, 91 FEOR 3409 (1991).

However, the EEOC and MSPB reversed themselves in two very important decisions, *Johnson v. Babbitt*, 96 FEOR 3123 (1996) and *Kimble v Department of the Navy*, 70 MSPR 617 (1996).

In *Johnson* a maintenance worker at the Golden Gate Recreation Area had been suspended for sleeping on the job, tardiness and continued misconduct. In a letter issued at the time of the discipline, the agency noted that future misconduct could result in the employee's removal and that he should seek rehabilitation if he had a substance abuse problem or face the possibility of removal. The employee was referred to a residential treatment program and the agency approved 45 days of advanced sick leave in order to allow him to attend. He was advised that his participation in the program would be necessary for him to receive paid leave. The agency later discovered that the employee had been absent from the treatment program for about a month. It thereafter removed the employee for absence without leave and providing false information to a management official.

Before the MSPB the parties stipulated that the employee was a disabled employee suffering from substance abuse which included alcoholism and was participating in a rehabilitation program; the misconduct was caused by the employee's alcoholism; the agency knew of the employee's disability at the time it took the action against him; and that the petitioner did not dispute the merits of the charges against him.

The sole issue on appeal was whether the agency fulfilled its obligation to provide the employee with a firm choice between treatment and removal prior to his discharge. The MSPB held that such a firm choice was provided and upheld the removal. The employee petitioned the EEOC for review of the MSPB decision.

The EEOC explained that the doctrine of firm choice was designed to force an employee to confront his alcoholism and seek treatment. It consists of warning the alcoholic employee with performance and conduct problems that he will be removed if he does not enter into and follow through with a program that treats alcoholism.

The EEOC ruled, however, that federal employers are no longer required to provide a firm choice between treatment and removal prior to discharge because the Rehabilitation Act Amendments of 1992 changed the applicable standard to be applied to alcoholics.

Specifically the 1992 amendments provide in pertinent part that the ADA standards will be applicable to the Rehabilitation Act.[6]

---

[6]29 U.S.C. 791(g) provides:

> The standards used to determine whether this section has been violated in a complaint alleging non-affirmative action employment discrimination under this section shall be the standards applied under title I of the [ADA](42 U.S.C.12111 et seq.) and the provisions of sections 501 through 504, and 510, of the [ADA](42 U.S.C. 12201-12204 and 12210), as

The ADA further provides that an employer:

> may hold an employee who engages in the illegal use of drugs to the same qualification standards for employment or job performance and behavior that such entity holds other employees, **even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee.** (Emphasis added).

29 U.S.C. 12114(c)(4).

Thus the EEOC held:

> We find that section 501, as amended by the Rehabilitation Act Amendments of 1992 to incorporate ADA employment standards, no longer requires that a firm choice be provided.

(Decision, p.6). It further concluded that when disciplining alcoholic employees:

> . . . employers do not have to excuse the violation of uniformly-applied conduct or job performance standards as a form of reasonable accommodation.

(Decision, p.6).

Accordingly, the EEOC sustained the removal without exploring whether a firm choice had, in fact, been provided by the employer.

Subsequently, in *Kimble* the MSPB adopted the EEOC's reasoning in *Johnson v. Babbitt, supra*.

> We therefore adopt its [the EEOC's] rule for this and future cases. In so doing, we overrule *Harris* 57 M.S.P.R. 124; *Banks v. Department of the Navy* 57 M.S.P.R. 141 (1993); and *Calton*, 44 M.S.P.R. 477, as well as all other Board decisions that may be interpreted to require imposition of the firm choice rule following the effective date of the Rehabilitation Act Amendments of 1992, October 29, 1992.

Accordingly, the EEOC and the MSPB have eliminated the firm choice requirement as a prerequisite to removing an alcoholic employee for conduct or performance caused by his alcoholic condition. Current EEOC and MSPB continue to apply the *Johnson* and *Kimble* analysis. See *Walsh v. United States Postal Service*, 74 MSPR 627 (1997);*Vigil v. West, Secretary, Department of the Army*, 96 FEOR 3149 (1996).

However, in *Humphrey v. Navy*, 76 MSPR 519 (1997) an employee's 31 day suspension was reversed where the agency violated its own regulations which required abeyance and firm choice

---

> such sections relate to employment.

rather than discipline. Where an alcoholic employee shows that he has a right to accommodation under agency's own rules, collective bargaining agreements, or policy, and such right has been denied, he has proven a claim of harmful procedural error rather than disability discrimination.

Agencies continue to be obligated to accommodate qualified employees who are disabled by alcoholism. Thus, a supervisor would continue to have to consider a reasonable accommodation request made by an alcoholic employee who, for example, requests a more flexible schedule to seek treatment. The agency would not, however, be required to provide a firm choice prior to removal if their conduct or performance warranted discharge.

Johnson and *Kimble* should not be read to preclude considering firm choice as an accommodation to an alcoholic employee who engages in misconduct. The supervisor may voluntarily elect to provide the employee with a firm choice. *See Walsh, supra.*

There is good reason why a supervisor might make such an election. Despite the holdings of the EEOC and the MSPB, it is unclear whether the courts will likewise abandon the well entrenched firm choice doctrine. Moreover, depending on the circumstances of the individual case, it may be good management to offer a firm choice and try to rehabilitate an otherwise productive employee who has fallen pray to the disease of alcoholism.

Finally, the MSPB has found that an appellant's potential for rehabilitation, a mitigating factor under *Douglas v. Veteran's Administration*, 5 M.S.P.R. 280, 306 (1981), is enhanced by his/her entry into treatment before the removal action was taken. *Walsh, supra.* Accordingly, the deciding official is well advised to consider medical evidence that establishes a nexus between an alcoholic employee's misconduct and his alcoholism and any efforts the employee may have made to seek treatment.

9. Addiction to illegal drugs as an impairment

When Congress passed the Americans with Disabilities Act (Title I of the ADA), Pub. L. 101-336, 104 Stat. 330, 42 U.S.C. § 12111 *et seq*., July 26, 1990, it also amended the Rehabilitation Act of 1973 (Title V, § 512 of the ADA) in that "individuals who are currently engaged in illegal drug use" are excluded from the definition of the term "individual with handicaps" as set forth in 29 U.S.C. §706(8)(C)(I). In other words, current illegal drug users are no longer considered disabled employees and are not covered by the Rehabilitation Act. *Hill v. Runyon, Postmaster general, U.S .Postal* Service, 97 FEOR 3207(1997); *Romanos v. Runyon, Postmaster General, U.S. Postal Service*, 94 FEOR 3109 (1993). Alcoholism continues to be a disability under the Act. 42 U.S.C. § 12211, Sec. 512.

An individual who is discriminated against on the basis of a history of illegal drug use but is not a current drug user continues to be covered under the Act. Similarly, an individual who is addicted to legal drugs continues to be a covered.

The House Conference Report on the ADA provides:

> Section 104(b)(2) provides that a person cannot be excluded as a qualified individual with a disability if that individual is participating in a supervised rehabilitation program and is no longer engaging in the illegal use of drugs. This provision does not permit persons to invoke the Act's protection simply by showing that they are participating in a drug treatment program. **Rather, refraining from illegal use of drugs also is essential. Employers are entitled to seek reasonable assurances that no illegal use of drugs is occurring or has occurred recently enough so that continuing use is a real and ongoing problem.**

H. Conf. Rep. No. 101-596, 101st Cong. (1990), p. 65 *reprinted in* 1990 U.S. Code Cong. & Ad. News 267, 573.

The House Conference Report further clarifies that the definition of *illegal* current drug use means:

> . . ."illegal use of drugs" mean[s] the use of drugs, the possession or distribution of which is unlawful under the Controlled Substances Act and does not mean the use of controlled substances taken under supervision by a licensed health care professional or other uses authorized by the Controlled Substances Act or other provisions of Federal law.

H. Conf. Rep. No. 101-596, 101st Cong. (1990), p. 58, *reprinted in* 1990 U.S. Code Cong. & Ad. News 267, 566.

10. Compensatory damages under the Rehabilitation Act

Section 102(b) of the Civil Rights Act of 1991 permits, for the first time, the award of compensatory damages (but not punitive damages) to federal employees found to have been a victim of intentional unlawful discrimination. *Finlay v. United States Postal Service*, EEOC Appeal No. 01942985 (1997). Compensatory damages are available in disability discrimination cases under the Rehabilitation Act, except that in a disability discrimination reasonable accommodation case no compensatory damages will be awarded if the agency has engaged in "good faith efforts" to reasonably accommodate the employee, *Luellen v. United States Postal Service*, 97 FEOR 3070 (1996). Compensatory damages are not available for claims under the Age Discrimination and Employment Act (ADEA). *Falks v. Department of the Treasury*, 96 FEOR (1996).

Compensatory damages may be had for "any proximate consequences which can be established with requisite certainty." "Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Rights Act of 1991", EEO Compliance Manual No. 165, p. 39,

45 (1991) citing 22 Am Jur 2d Damages § 45 (1965). Compensatory damages include damages for past pecuniary loss (out of pocket loss), future pecuniary loss, and nonpecuniary loss (emotional harm). *Id*. Section 102(b)(2) excludes from compensatory damages "backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964."

Section 102(b)(3) authorizes the payment of compensatory damages for past pecuniary (tangible out-of-pocket) damages proximately caused by the agency's unlawful discrimination, and places a cap of up to $300,000.00 on future pecuniary damages, and nonpecuniary damages (intangible harm, e.g. emotional harm). *Id*. at 45-47.

Pecuniary damages include, for example, expenses for moving, job search, medical and other tangible out-of-pocket expenses that were actually incurred as a result of the discriminatory conduct. The critical question is whether the conduct was the cause of the loss. *Id*. at 46.

Future pecuniary damages are out-of pocket expenses that are likely to occur after conciliation, settlement, or the conclusion of litigation. Future pecuniary damages are subject to the $300,000.00 cap and do not include front pay. *Id*. at 46.

Nonpecuniary damages are available for intangible injuries of emotional harm such as pain, suffering, inconvenience, mental anguish, and loss of enjoyment of life. Other nonpecuniary losses could include injury to professional standing, injury to character and reputation, injury to credit standing, loss of health, and any other nonpecuniary losses that are incurred as a result of the discriminatory conduct. *Id*. at 48.

Emotional harm and other non-pecuniary damages will not be presumed simply because the complainant is a victim of discrimination. The existence, nature, and severity of the emotional harm must be proved. *Id*. at 48. Like pecuniary damages, there must be a causal connection between the emotional harm and the agency's illegal conduct. *Id*. at 48 *citing Gore* v. *Turner*, 563 F.2d 159, 164 (7th Cir. 1977).

The complaining party has a duty to mitigate his/her damages and may not recover those damages for any harm that he/she could have avoided or minimized with reasonable effort. *Id*. at 47. However, the agency has the burden to prove the complainant failed to exercise reasonable diligence to mitigate his/her damages. *Id*. at 47.

The EEOC has the authority to award compensatory damages. *Jackson* v. *Runyon, Postmaster General, U.S. Postal Service*, 93 FEOR 3062 (1992). The failure to award compensatory damages may defeat a motion to dismiss for failure to accept an offer of full relief. *Id*.

The *Small Business Job Protection Act of 1996*, PL 104-188, Section 1605 has significantly altered the taxation of compensatory damages:

The Act continues to exclude from gross income damages received for personal injury.

Damages for emotional distress, even when the distress causes physical symptoms, are generally not excludable unless the distress was caused by a physical injury.

Emotional distress damages not resulting from a physical injury may be excluded from gross income to the extent they reimburse expenses for medical care.